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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 603.

MOUNTAIN STATES SECURITIES CORPORATION et al.,
Petitioner,

vs.

PERRY O. HOOPER, as Trustee in Bankruptcy of
CONSOLIDATED AMERICAN INDUSTRIES, INC.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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Respondent.

BRIEF ON BEHALF OF RESPONDENT.

QUESTIONS PRESENTED

Section 10 (b) of the Securities Exchange Act of 1934[1] and SEC Rule X-10B-5 promulgated pursuant to the Act[2]

[1] 15 U. S. C. § 78j (b).

[2] 17 C. F. R. 240.10b-5.

declare unlawful, in broad language, interstate fraud in connection with the purchase or sale of securities. The principal question presented by the Petition, and the principal question decided below is whether a corporation which has been defrauded in a transaction in which it acquires worthless securities is denied the protection of Section 10 (b) and Rule X 10B-5 because it paid for the purchase in its own stock?. The refusal of the Fifth Circuit to exclude such a transaction from the scope of Section 10 (b) has occasioned the Petition here.

Ancillary to the central question of the application of Section 10 (b) are the questions raised below and decided against petitioners relating the statute of limitations and whether respondent selected the proper forum in the bringing of the suit.

STATEMENT OF THE CASE.

There is no evidence in this case. The appeal to the Fifth Circuit was from an order dismissing the complaint for failure to state a cause of action. The complaint describes in some detail a complex interstate fraud in which petitioners and others participated. The result of the fraudulent scheme was the issuance of 700,000 shares of the bankrupt's capital stock in exchange for valueless securities.

Petitioners in their commendable efforts at brevity have over-simplified the statement of the facts and the case, and have failed to recite material portion of the complaint. Respondent would adopt as a fair, succinct statement of the case the recitation of the fraudulent scheme by the Fifth Circuit (Petitioner's Brief, pp. 25-28).

REASONS IN OPPOSITION TO THE GRANTING OF THE WRIT.

I.

The Securities Act Questions.

In 1942 the SEC, acting under the powers granted it under Section 10 promulgated Rule X-10B-5 declaring it to be unlawful in connection with the purchase or sale of any security in interstate commerce:

> "(1) to employ any device, scheme or artifice to defraud,
>
> "(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person . . ."

Since **Kardon v. National Gypsum Co.**, 69 F. Supp. 512 (E. D. Pa.), the Courts have consistently recognized that a violation of Section 10 or Rule X-10B-5 gives rise to a private right of action, and this position has been favorably received by the commentators.

Petitioners here urge that (1) there was no sale and (2) that respondent, or his bankrupt are not within the class

Fischman v. Raytheon Mfg. Co., 188 F. 2d 783, 2d Cir. 1951; Fratt v. Robinson, 203 F. 2d 627, 6th Cir. 1953; Ferraiolo v. Newell, 286 F. 2d 445, 5th Cir. 1960; Shaw v. Germantown Fire Ins. Co., 174 F. 2d 799, 3d Cir. 1949; Matheson v. Niagara Chemical Co., 6th Cir., No. 16,067, November 28, 1961.

See 59 Yale Law Journal 1129, "The Expansion of Rule X-10B-5: An Emerging Remedy for Defrauded Investors", 45 Minn. Law Review 23 (Oct. 1960), "The Securities Regulation of Stock

benefited by Section 10 and the Rule because the bankrupt was an issuing corporation.

Petitioners charge that the Court below found that the complaint charged "an arrangement" in which securities were "otherwise disposed of" by taking out of context the definition of a sale from Section 3 (a) (14) of the Act. But petitioners have read the Court's opinion out of context. The opinion states:

> "Certainly the transactions between Consolidated and the apparent transferee, Mid-Atlantic, had many earmarks of a sale. Mid-Atlantic had properties which it ostensibly valued highly. It was willing to trade these properties as consideration for the Consolidated stock. Consolidated, on the other hand, had its own stock which had a marketability of $1 per share. To the corporation it had the same economic value as would the proceeds received from a public issue of like shares to acquire property which it desired and which it had been led to believe was valuable. Before the transaction Consolidated had 700,000 shares of stock. After the transaction it no longer had the stock, but if had, or thought it had, the property. If this is not a sale in the strict common law traditional sense, it certainly amounted to an arrangement in which Colsolidated 'otherwise di posed(d) of' its stock. § 3 (a) (14), 15 U. S. C. A. 78c (a) (14)."

The primary target of the Act and the Rule is fraudulent conduct in connection with security transactions. "Sale" and "sell" are given extremely broad statutory definitions so that, as to cases under Section 10, sophistication of the fraud will not destroy the remedy. Here 700,000 shares of stock were issued by the stock transfer agent of the bankrupt as a result of an elaborate scheme under which two worthless contract rights were transferred to the bankrupt in consideration for the stock.

Before the exchange the bankrupt had its shares. After the exchange it no longer had the shares. The transaction was as much a sale as the "sale" of stock in a fictitious corporation for cash. What Congress has sought to prohibit are "crooked deals" involving securities. It would be strange indeed if the "crooked deal" involving the securities in this case was taken out of the Act's protection because it was so crooked that the deal could not be designated as a sale. Congress has not put such a premium on the ingenuity of the particular fraud.

The objection made by petitioners could be made in almost any Section 10 (b) case. The only qualification would be the establishment of a fraud of sufficient magnitude to permit a court to declare the transaction void. But such a result would merely force the fraudulent actor to return the cookie to the jar. And this remedy has existed long before the Act. Indeed it was the inadequacy of the remedy which underlies the enactment of Section 10 and the Rule.

Petitioners assail the holding below because they contend that the bankrupt, as the issuing corporation was not within the class sought to be protected. Petitioners' argument is climaxed with the assertion that there is adequate protection to the bankrupt without resorting to Section 10 and Rule X-10B-5. The clear inadequacy of the suggested remedies is one of the most compelling reasons for recognition of respondent's claim here.

The bankrupt is a Delaware corporation. Under the Delaware constitution and statutes the corporation or its trustee in bankruptcy can elect to sue to cancel the stock issued without consideration or assess the holders for par value. Even Petitioners do not suggest that recovery by

[illegible] v. Robinson, supra,

[illegible] v. [illegible], supra,

[illegible] 54

le par on stock selling on the market at the time of the fraud at a price in excess of $1.00 per share is an adequate remedy. It is not unusual for the par value of a stock to bear little or no relationship to its market value. To permit the par value to be the sole and arbitrary measure of recovery for the amount due on stock fraudulently procured by use of interstate instrumentalities is an open invitation to the manipulators.

The complaint also demonstrates the hopelessness of the alternative right to sue to cancel. According to the complaint in excess of 400,000 of the original 700,000 shares are in the hands of numerous persons throughout the country and abroad. We think it a fair, and indeed almost inescapable conclusion that many of these persons paid value for their shares without notice of the fraudulent circumstances under which the shares went on the market.

The Fifth Circuit treated the case as one in which the securities involved were the 700,000 shares. It could have also considered the rights to acquire securities, which rights formed the purported consideration for the stock, as the securities involved in the transaction. Thus the bankrupt can be considered as a purchaser investor or a seller investor.

If the assets transferred to the bankrupt were securities within the Act, or if part of the assets can be so classified, the bankrupt is a "purchaser" investor and we will assume that petitioners would concede that the bankrupt was within a protected class. The Circuit Court did not deem it necessary to pass on the status of the bankrupt as a purchaser since it found it to be a seller.

The "consideration" moving from the bankrupt was admittedly a "security," within the Act. It was also a security of value. As commented below, the use of watered stock as a means of expanding and acquiring investments is common. The investment of previously unissued

shares rather than cash or some other asset does not change the fact of the investment nor should the issuer be deprived of the Act's protection against fraud because of this mean of acquiring assets.

The status of respondent is not adversely affected by Petitioners' reliance upon, and quote from **Howard v. Furst**, 238 F. 2d 790 (2 Cir. 1956). The **Howard** case declared that a corporation through a derivative suit could not complain of fraud in connection with proxies fraudulently solicited in alleged violation of Section 14 (a) of the Act.

Congress has recognized the inadequacy of the common law fraud remedies to deal with nationwide schemes to defraud in security transactions. The history of Section 10 and Rule X-10B-5 is one of increased judicial application of the Section and its Rule to such fraudulent schemes. No reason is advanced by Petitioners why the present case should begin the retreat to horse and buggy remedies in jet age security frauds.

II.

Alabama as a Proper Forum.

We do not conceive Petitioners to argue that Section 27 of the Act requires that all events constituting a violation of Section 10 and the Rule must occur within a particular district before that district court could have jurisdiction. Security frauds are just not that simple. Nor do Petitioners argue that the Fifth Circuit was in error in stating that "The Act meant to vest jurisdiction in every district where any use such instrumentalities of the mail or interstate commerce was of material importance to the consummation of the scheme."

Before the shares be issued it was necessary for the conspirators to obtain the contract rights which they pro-

posed to transfer to the bankrupt. As the complaint alleges, the central figure of the whole fraudulent scheme was one Ben Jack Cage, who is not a party because he is a fugitive from justice and believed to be in the Republic of Brazil. In order to obtain the contract right to acquire the stock of the Cuban insurance company, Cage, from outside Alabama, telephoned the bankrupt's officers in Alabama and fraudulently represented that the bankrupt already owned the Cuban company and that unless $10,000 was immediately sent to Cuba, a valuable investment would be lost. The money was then sent and was used by Cage to acquire the right to purchase the stock of the Cuban company.

Petitioners' theory is that since this Court held in **United States v. Johnson**,[7] that in a prosecution for violation of Federal Denture Act against the person mailing in violation of the Act could be maintained only in the district of origination, this action can be maintained only in the district from which Cage telephoned Alabama. If this action were a criminal prosecution, Petitioners seemingly would concede that Alabama would be one of the forums in which the prosecution could be carried on since they do not dispute that 18 USC Section 3237 was enacted to overcome the **Johnson** case. Nor do they contend that Congress cannot under the circumstances authorize suit in a forum like Alabama.[8]

[7] 323 U. S. 65, 65 S. Ct. 249, 89 L. Ed. 236.

[8] The clear language of the *Johnson* case prohibits such an argument:

"Must these appellees be tried in the Northern District of Illinois or may they be tried in the district of any State through which the dentures were carried, including Delaware, the place of delivery? Had Congress authorized such discretion in the enforcement of this Act? If it has, there is an end to the matter, for Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported." 323 U. S. at p. 274.

It would be strange indeed if a criminal proceeding can be sanctioned in Alabama and a civil action is not permitted. The clear answer, and that announced below is that the general provisions governing interstate transmissions such as 18 U. S. C. 3237 must be read into the enforcement sections of the present Act.

III.

The Statute of Limitations.

The Alabama statutes governing limitations on fraud actions provide for one year or one year after discovery.[9] The fraud took place in October-December, 1956. The bankrupt was adjudicated in May, 1957. The complaint alleges that the action was commenced within two years of discovery.

Section 11 (c) of the Bankruptcy Act[10] provides that the trustee shall have two years within which to sue on a claim of the bankrupt not barred as of the date of adjudication. Does the two year limitation of Section 11 (c) permit two years after discovery of fraud cases?

The answer to this contention below was short:

> "But this is no insurmountable obstacle for we agree with Dabney v. Levy, 2 Cir., 1951, 191 F. 2d 201, that the two-year limitation prescribed in § 11 (c) does not begin to run until the time the fraud reasonably should have been discovered. That Court applied the teaching of Bailey v. Glover, 1875, 21 Wall. (88 U. S.) 342, 22 L. Ed. 636, subsequently applied in Holmberg v. Armbrecht, 327 U. S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743, 748, which declared that 'this equitable doctrine is read into every federal statute

[9] Title 7, §§ 26 and 42, Code of Alabama, 1940, set forth in Petitioner's Brief, pp. 6-7.

[10] 11 U. S. C., § 29 (c), set forth in Petitioner's Brief, p. 6.

of limitations.' See 1 Collier, Bankruptcy, ¶11.15, pages 1188-1189 (1959 Supp.)."

The reason for the rule is stated at 5 A Remington on Bankruptcy, Section 2349.1, p. 52:

> "It is a rule of general application that courts of equity, though they will ordinarily apply limitation provisions, are not strictly bound thereby, at least unless the statute is so clearly intended to apply in equity as well as law to make it imperative; and where a cause of action is based on fraud, they will not consider such cause of action to have accrued until discovery of the fraud or coming into knowledge of facts sufficient to place an inquiry which would have led to such discovery. This principle must be read into § 11 of the Bankruptcy Act, and in instances of excusable delay in discovery of fraud, it can have the effect of leaving a cause of action not barred, and suit by a trustee to enforce it not too late, though suit is not commenced until after expiration of both the stated limitation period under states law and the two-year period after adjudication of bankruptcy."

CONCLUSION.

The opinion below is correct. The questions sought to be raised here were treated at length there. The holding below is consonant with the other circuits. The petition should be denied and Respondent permitted to reach the merits of his case.

Respectfully submitted,

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Certificate of Service.

I, Truman Hobbs, attorney for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of January, 1961, I have served copies of the above brief as follows:

1. On the Securities Exchange Commission, by mailing a copy in a duly addressed envelope with air mail postage prepaid, to Thomas G. Meeker, its general counsel, at the offices of the Commission, Washington 25, D. C.

2. On attorneys for the petitioners by mailing a copy in a duly addressed envelope with first class postage prepaid to Jack Crenshaw, 701 First National Bank Building, Montgomery 4, Alabama; Joseph F. Johnston, 902 First National Building, Birmingham 3, Alabama; and James C. Barton, 822 Brown Marx Building, Birmingham 3, Alabama.

.....

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v.

PERRY O. HOOPER, as Trustee in Bankruptcy of CONSOLIDATED AMERICAN INDUSTRIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AS AMICUS CURIAE, IN OPPOSITION

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BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AS AMICUS CURIAE, IN OPPOSITION

The Solicitor General submits this brief on behalf of the Securities and Exchange Commission, as *amicus curiae*, in opposition to the petition for a writ of certiorari. The Commission appeared in the Court of Appeals in support of the position of the respondent.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 24-44) is reported at 282 F. 2d 195. The opinion of the District Court (Pet. 19-23) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 12, 1960 (Pet. 44). Timely petitions for rehearing were filed and rehearing was denied on September 26, 1960. The petition for a writ of certiorari was filed on December 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa.

QUESTIONS PRESENTED

1. Whether an issuing corporation may have a right of action under Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j, and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, for fraud in the purchase of its previously unissued stock.

2. Whether venue is properly laid in the district where an interstate communication in furtherance of a fraudulent scheme in violation of Section 10(b) and Rule 10b-5 was received.

3. Whether the federal doctrine that the bar of limitations does not commence to run until the fraud was or reasonably should have been discovered is to be applied with respect to the limitations provision in Section 11(e) of the Bankruptcy Act, 11 U.S.C. 29(e).

STATUTES INVOLVED

Pertinent provisions of the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. 78a, *et seq.*, and of the Bankruptcy Act, 30 Stat. 544, as amended, 11 U.S.C. 1, *et seq.*, are set forth in the petition (Pet. 4-6).

STATEMENT

Perry O. Hooper, as trustee in bankruptcy of Consolidated American Industries, Inc. (Consolidated), brought suit in the United States District Court for the Middle District of Alabama against the petitioners, all of whom are non-residents of Alabama. Invoking the jurisdiction of the District Court under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa, the complaint charged that Consolidated was injured as a result of petitioners' fraudulent conspiracy in violation of Section 10(b), 15 U.S.C. 78j, of that Act and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. The trustee sought an accounting and damages on behalf of Consolidated. Motions to dismiss the complaint and quash service of process were granted by the District Court on the theory that a corporation, whose own previously unissued stock was fraudulently purchased, was not entitled to sue under Section 10(b) and Rule 10b-5.

The essential facts as set forth in the complaint are as follows:

One Ben Jack Cage had controlled Consolidated and had been an officer and director thereof (R. 4). On October 18, 1956, Cage resigned as an officer and

director in favor of a new management (R. 5). Shortly thereafter, Cage conspired with the petitioners to obtain 700,000 shares of Consolidated's unissued capital stock in exchange for certain assets of another corporation, Mid-Atlantic Development Company (Mid-Atlantic), which was owned by Cage and the petitioners (R. 8, 9.). These assets, consisting of certain purported rights to purchase stock of a Cuban insurance company and to acquire certain oil concessions located in Honduras, were presumably without value (R. 7, 8, 14). To obtain for Mid-Atlantic the right to purchase the Cuban insurance company stock, Cage, through interstate communications to the new management of Consolidated in Montgomery, Alabama, made false representations whereby Consolidated was induced to send $10,000 to Havana, Cuba (R. 9, 10). Thereafter, the petitioners' scheme was consummated through the preparation and presentation to Consolidated's transfer agents of certain spurious documents purporting to evidence authorization for the issuance of 700,000 of Consolidated's shares in exchange for the "rights" owned by Mid-Atlantic (R. 10, 11, 12, 13). During this period, Consolidated's shares were selling from $1.00 to $2.75 per share (R. 5).

The trustee in bankruptcy did not discover the fraudulent conspiracy nor did he come into knowledge of facts sufficient to place him on inquiry which would have reasonably led to discovery thereof within two years of the commencement of the action (R. 94).

The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and re-

manded the action for further proceedings. The Court of Appeals held (1) that a corporation which is fraudulently induced to issue its stock without consideration is entitled to bring an action based on a violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5, (2) that an interstate telephone call received in the Middle District of Alabama in furtherance of the fraudulent scheme constituted an act occurring within that district, so as to satisfy the venue requirements of Section 27 of the Securities Exchange Act of 1934, and (3) that the two-year limitation prescribed in Section 11(e) of the Bankruptcy Act governing actions brought by the trustee does not commence to run until the time the fraud was or reasonably should have been discovered by the trustee.

ARGUMENT

1. The proposition that a violation of Rule 10b-5 gives rise to a private right of action, although of substantial importance and never passed upon by this Court, has been established in three Courts of Appeals in addition to the court below, and is clearly correct. There is no conflict. As the court below noted (Pet. 30): "along with the Second, Third and Ninth Circuits, we now adopt, as we earlier foreshadowed, the principles set forth in the trail-blazer decision of *Kardon* v. *National Gypsum Co.*, E. D. Pa., 1946, 69 F. Supp. 512, that a violation of rule 10b-5 gives rise to a private right of action."

In the instant case, the court applied this doctrine

to a situation where a corporation, in the issuance of its own stock, is injured by conduct violative of the rule. Petitioners contend (Pet. 12-13) that an issuing corporation cannot be considered an investor and, hence, is not within the class intended to be protected by Section 10(b) of the Securities Exchange Act and Rule 10b-5; accordingly, they urge that no private right of action arises in the corporation's favor from the violation, since such a right is implied only on behalf of those injured by the breach for whose protection the statutory duty is created. As the court below noted, however, the Commission was empowered to promulgate rules under Section 10(b) "in the public interest" *or* "for the protection of investors" (Pet. 4). In view of the statutory purpose (set forth in Section 2 of the Act) "to insure the maintenance of fair and honest markets" with respect to securities transactions, the Commission "in the public interest", as well as "for the protection of investors", properly made unlawful (where jurisdictional media are used) the purchase through fraudulent means of any security, not excluding previously unissued stock of a corporation. Thus, the Court of Appeals correctly held that a corporation, the unissued stock of which was so purchased and which was thereby directly injured by a violation of the rule, falls within the segment of the public for whose protection the statutory duty was created, *i.e.*, a defrauded seller of securities.

This holding does not, as petitioners assert (Pet. 11), conflict with *Howard* v. *Furst*, 238 F. 2d 790 (C.A. 2), certiorari denied, 353 U. S. 937. That case

was not concerned with the provisions of the statute or the rule involved here. It upheld the dismissal of a stockholders' derivative action brought, *inter alia*, to rescind the sale of their corporation's assets to another corporation, upon the basis of allegations that the required consent of the stockholders had been obtained through violation of the Commission's proxy rules, 17 C.F.R. 240.14a-1—14a-11, adopted pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a). The court below properly refused to interpret the language of that case, quoted by petitioners, as going beyond the confines of Section 14(a).

The court below also properly decided that the transaction, which took the form of a sale of stock by the issuing corporation to the petitioners, although in fact the sale was completely spurious, was a transaction intended to be outlawed by Section 10(b) and Rule 10b-5. This holding is analogous to that in such cases as *Seeman* v. *United States*, 90 F. 2d 88, 89 (C.A. 5), certiorari denied, 305 U. S. 620, to the effect that a defendant may violate the provisions of the Securities Act of 1933 prohibiting fraudulent sales of securities even though the securities sold were forged.

2. The question with respect to venue was properly decided by the court below and is not in conflict with the holding of this Court in *United States* v. *Johnson*, 323 U.S. 273, as petitioners contend (Pet. 14-15). In *Johnson*, the Court affirmed a judgment quashing an information for violation of the Federal Denture Act of 1942, 56 Stat. 1087 (now 18 U.S.C.

1821),[1] on the ground that the prosecution of the sender of dentures illegally into a state could not be laid in the state of the importer; the Court reasoned that the crime of the sender was distinct from the crime of the importer, and hence was completed where and when the illegal merchandise was deposited in the mails. But this Court also noted (*id.* at 274) that "Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported", citing *Armour Packing Co.* v. *United States*, 209 U.S. 56.[2] The venue provisions of Section 27 of the Securities Exchange Act (Pet. 5-6) sanction both civil and criminal suits in any district, *inter alia*, "wherein any act or transaction constituting the violation occurred". Since, as noted by the court below, the interstate telephone call received here in the Middle District of Alabama "was an important step in the consummation of the scheme" (Pet. 37) violative of Section 10(b) of the Securities Exchange Act and Rule 10b-5, the court correctly held it was sufficient to authorize the venue

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[1] The Federal Denture Act, at that time, 18 U.S.C. (1910 ed., Supp. III) 420f, g, h, made it unlawful, "in the course of the conduct of a business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into * * *" a state or territory any denture the cast of which was taken by a person not licensed to practice dentistry in the state into which the denture is sent.

[2] See also, *e.g.*, *In re Palliser*, 136 U.S. 257, 266; *Benson* v. *Henkel*, 198 U.S. 1, 15; *Salinger* v. *Loisel*, 265 U.S. 224.

and the extra-territorial service of process provided by Section 27.

Moreover, as indicated in the petition (Pet. 6, 15), subsequent to *Johnson*, Congress adopted 18 U.S.C. 3237, which provides in pertinent part:

> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

The court below properly read this provision into Section 27 of the Securities Exchange Act. Cf. *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2).[3]

3. As to whether the trustee's cause of action was, on the face of the complaint, barred by the two-year limitation embodied in Section 11(e) of the Bankruptcy Act, we submit that the court below, agreeing with *Dabney* v. *Levy*, 191 F. 2d 201 (C.A. 2), correctly applied the principles announced by this Court in *Bailey* v. *Glover*, 21 Wall. 342, and *Holmberg* v. *Armbrecht*, 327 U.S. 392, that a limitations period does not begin to run until the fraud is (or should be) discovered. In *Dabney*, Judge Learned Hand, writing for the court, concluded (191 F. 2d at 205-206):

> * * * This we take to mean that in cases of "fraud," used to include at least instances of the kind at bar, when Congress does not choose ex-

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[3] See, also, *Travis* v. *United States*, No. 10, this Term, decided January 16, 1961.

pressly to say the contrary, the period of limitation set by it only begins to run after the injured party has "discovered, or has failed in reasonable diligence to discover" the wrong. * * * Indeed it would be monstrous if so bare-faced a taking of this corporation's funds as is here displayed were to escape restitution because the confederates had succeeded in keeping the transaction from detection for six years.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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